No. 13606

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA, at the Relation of and the Use of Westinghouse Electric Supply Company, WM. RADKOVICH COMPANY, INC., *et al.*,

Appellees.

Appeal From the United States District Court, Southern District of California, Central Division.

PETITION FOR REHEARING AND CERTIFICATE OF COUNSEL.

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PETITION FOR REHEARING AND CERTIFICATE OF COUNSEL.

Appellant, Glens Falls Indemnity Company, respectfully petitions for rehearing in the above cause and Albert Lee Stephens, Jr., one of Appellant's counsel herein does hereby certify that in his judgment this petition for rehearing is well founded and that it is not interposed for delay.

Part I.

As Grounds for Rehearing, Petitioner Respectfully Makes Four Points, in Part I of This Petition Followed by Authorities in Support Thereof in Part II Hereof.

1. The Court Has Erroneously Concluded,

> *"Failure of performance of conditions precedent is a matter of affirmative defense."* (Op. p. 7.)

We respectfully represent that this is the first time any court has decided a case on this principle and that it is a most serious error contrary to both procedural and substantive state and federal law.

As a procedural matter this is erroneous and contrary to provisions of the Federal Rules of Civil Procedure, Rule 9c.

As a substantive matter this concept has precluded recognition that performance of express conditions precedent to recovery must be *proved* by a plaintiff to warrant recovery and has caused the Court to overlook the express written contractual limitations to Appellant's liability as embodied in the Performance Bond of Appellant which is the agreement upon which recovery by Appellees is wholly dependent, to wit:

> "This Bond is Executed Upon the Following Conditions Precedent to the Right to Recover Hereunder." [R. 52.]

The further result of this error is to relieve the plaintiffs (Appellees) of the burden of proof of right to

recovery as though a defendant is *presumed to be liable* and has the burden of affirmatively proving the contrary.

Since proof of performance of conditions precedent is entirely lacking, it has further resulted in erroneously fixing liability of Appellant upon the Performance Bond, contrary to the intentions of the parties, which has in turn resulted in a failure to decide the fundamental issues of the appeal in connection with the Payment Bond.

In this connection, Appellant has asserted that performance of express conditions precedent in the Performance Bond was neither pleaded nor proved. The Court further erred in this connection by stating,

> "* * * the facts were found by the trial court to the contrary of the basis on which such defense is now asserted." (Op. p. 7.)

After careful re-examination of the findings, Appellant respectfully represents that they contain no reference whatsoever to performance of conditions precedent or to facts which would establish that such conditions had been performed.

2. The Court Held on Page 7 of the Opinion,

> "* * * Each of the bonds was a separate and distinct surety undertaking of Glens Falls and *each was intended for a distinct and separate purpose.* * * *" (Emphasis ours.)

This holding could only mean that the Performance Bond guaranteed performance and the Payment Bond

guaranteed payment, subject, of course, to the limitations contained in the respective bonds. What other purposes exist?

Observing the distinction quoted above, the Performance Bond would logically be eliminated as a basis for recovery on any matter relating to payment for materials and becomes irrelevant to the action.

Although the distinction is made to answer the argument that both bonds are affected by the conditions precedent which only appear in the Performance Bond, should this distinction not apply across the board?

Doesn't the option blow both hot and cold when this appears on the same page:

> "The Glens Falls performance bond indemnified Radkovich against a failure by Woolley to perform the subcontract. * * * Woolley did not fully and promptly pay for the materials * * *. This was just as much a breach of performance as if the electrical work specified in the contract was not completed. * * * Appellant was liable * * * under the performance bond * * *."

In the face of this interpretation of the Performance Bond, what is the "distinct and separate purpose" of the Payment Bond?

3. **The Decision Construes Rules 13 and 14 in Such a Way as to Give Judgment Against Appellant on a Non-Existent Cause of Action.**

The words "is or may be liable" which appear in Rules 13 and 14 refer to *who* "is or may be liable" under an existing cause of action. These provisions do not contemplate a suit or a judgment on a cause of action which will not arise against the cross-defendant or third party defendant as a result of the judgment in the principal action.

No claim can be stated under the Federal Rules unless a cause of action based upon substantive law exists. (See 28 U. S. C. A. 2072):

> "Such rules shall not abridge, enlarge or modify any substantive right. * * *"

The substantive law of California is such that no claim can be stated upon the Payment Bond in this case. See California Civil Code, 2778:

> "Upon an indemnity against claims, or demands, or damages, or costs, expressly, or in other equivalent terms, the person indemnified *is not entitled to recover without payment thereof;* * * *." (Emphasis added.)

The Court has misconstrued *Alberts v. American Casualty Co.* (1948), 88 Cal. App. 2d 891, at page 7 of the Opinion. This case merely held that the bond in the *Alberts* case was a liability bond and not a loss or damage

bond as is the bond in this case. The *Alberts* case did not interpret the law applicable to the bond in the present case.

The decision of this Court is exactly contrary to the decision of *Brown v. Cranston* (2d Cir., 1942), 132 F. 2d 631, 148 A. L. R. 1178, which was cited in the briefs. Failure to recognize this authority or to mention the point of the effect of the substantive law of California leaves a decisive issue of the appeal undecided and militates against the opportunity to settle this important question of law by certiorari.

4. This Court Has Cited Cases Indicating That a Proper Record Is Not Before the Appellate Court and That the Findings Settle the Issues. We Respectfully Urge That the Entire Record Is Before This Court and That the Findings Are Entirely Lacking or Not Responsive to the Issues Raised by Appellant or Are Inherently Inconsistent. These Issues Are Therefore Not Settled.

The finding that all of the Westinghouse materials went into the subcontract work [Findings XI and XII, R. 196] is clearly erroneous in face of Woolley's uncontradicted testimony:

> "Q. And that obligation to Westinghouse is for materials furnished on this job, is that true? A. That is right.
>
> Q. And those materials are not involved in any of those extras, are they? A. Yes; they are." [R. 457.]

nd is further clearly erroneous and hopelessly conflicting
ith Finding XV [R. 198] that:

> "Woolley furnished additional labor and materials not required under the prime contract * * * which were actually used in additions to the structures * * *." (The extras.)

The trial court fully recognized the facts supporting
ppellant's defense of Alteration of Contract by pre-
nature payment to Woolley by payments over a two month
eriod to November 1, 1947, but limited its findings in
manner unresponsive to this point by saying that it was
mpossible to tell what Woolley earned in any *one* month.

We respectfully urge the Court to examine and con-
ider the effect of the computations on the following double
age.

WOOLLEY'S PREMATURE PAYMENT.

QUESTION:

How Much Was Woolley Entitled to Be Paid on November 1, 1947

Materials (All concededly compensable)	$13
Labor	1

(Note: Woolley's November 1, 1947 estimate included labor at $3,439.38 [Exhibit 13.] Compensable labor was $1,824.95. Non-productive labor, which was non-compensable, was $949.22. Subtracting these two items leaves an overcharge with no basis whatever of $665.21, which is non-compensable. See Trial Court's comment below.)

Total which Woolley had earned on November 1, 1947	$14
Subtract 10% retention required by the contract	1

ANSWER:

Woolley Was Entitled to Be Paid This Total $13

QUESTION:

Was Woolley Paid More Than He Was Entitled to Be Paid?

Total paid for work to November 1, 1947	$20,000.00
Total payment to which Woolley was entitled	13,443.00

ANSWER:

Yes, Woolley Received Overpayment of $ 6,557.00

Quoting from Trial Court's Memorandum of Conclusions [R. 120-121]:

"The first estimate, dated September 25, 1947, shows materials listed as been received on the job site in the total sum of $9,404.37, with sales tax and bringing the total to $9,885.37; no labor cost is listed. On this estimate, was paid $5,000.00.

"The next estimate, November 1, 1947, for the month of October, shows the materials listed on the previous estimate plus some other materials, and the r 'materials to date, $13,111.71' and 'labor costs to date, $3,439.38.' The total est in the sum of $16,551.09. Woolley's pay roll [Exhibit 12] beginning August 2 to October 29, 1947, inclusive, adds up to $2,774.17. Woolley testified th August 28, 1947, to October 1, 1947, his men did no work on the job except bing at a pay roll cost of $200.00, leaving an inactive pay roll up to October sum of $949.22. Subtracting this sum we have a total of $1,824.95 for actual la going into the job up to November 1. On October estimate Woolley testified paid $15,000.00, which is about the amount of the estimate less the retaine However, included in this estimate was material costing about $9,404.37 fo

IT'S IN THE BOOK.

s total payroll from starting job on August 28, 1947 ber 29, 1947 $2,774.17

See quote on prior page from Trial Court's Memorandum Conclusions; see Exhibit 12.)

non-compensable labor charge 949.22

See Finding XVI [R. 199]: "That by reason of this lay Woolley was damaged in the amount of $949.22 for nich sum Radkovich is indebted to Woolley but no part said sum is due or owing from Radkovich's Sureties to oolley."—indicating that this was not proper to include as mpensation for work but only recoverable as damages for lay which the contract does not include in the payment nedule; see also, quote from Trial Court's Memorandum previous page; see Woolley's testimony [R. 397, 454, 5].)

e is compensable labor $1,824.95

ontract provides for progress method of payment in the provided by Article 16 of the prime contract (Subcontract [R. 44, 118].)

6 of prime contract requires 10% retention [R. 118-119]: b) In making such partial payment there shall be retained on the estimated amount until final completion and accept- of all work * * *."

0 was paid on 1st estimate dated Sept. 25, 1947 [Finding XVII, R. 200, 261, 427, 120.]

0 was paid on 2nd estimate dated Nov. 1, 1947 [R. 428, 120].

0 Total payments for job to Nov. 1, 1947 (See Court's comment on opposite page.)

e had already been allowed $5,000.00 for September plus about $9,404.37 for October, and actual labor cost of $1,735.95 for which he was allowed 39.38 less 10%."

norandum of Conclusions the Trial Court further said:

we might be able to figure what percentage of the total amount of the each estimate represented, there is no evidence that the work covered by e represented the same percentage of the work called for by the subcontract."

we are of the opinion that there is 'no way in the world' for counsel or the ascertain from the evidence just what amount in any one payment date the or was entitled to receive; . . ." [R. 125.]

tfully submit that the evidence nevertheless establishes a substantial pre- nce it is manifest that the materials were paid for twice and that the pro- or could not have produced progress in proportion to the amount paid.

Part II.

Authorities in Support of Grounds for Rehearing.

1. The Court Has Erroneously Concluded.

"Failure of performance of conditions precede is a matter of affirmative defense."

A. Performance of Conditions Precedent Must B Alleged in the Complaint.

We quote from Ohlinger's Federal Practice, revise edition, Vol. 3, page 167:

> "Rule 9(c) requires plaintiff to plead general the performance of conditions precedent, . . ."

Rule 9(c) provides:

> "In pleading the performance or occurrence of co ditions precedent, it is sufficient to aver generally th all conditions precedent have been performed or ha occurred. . . ."

The wording of the rule is explained by Barron ar Holtzoff, Volume 1, page 553 of Rules Edition:

> "The rule marks a departure from the common la practice which required the detailed pleading of pe formance of conditions precedent."

and comments on page 551:

> "The rule controls and state rules of practice a not applicable in federal district courts. This do not mean, however, that there is no necessity f alleging performance or occurrence of conditio precedent. On the contrary the pleader must alle such compliance or that performance or occurren was waived or excused."

cites *McAllister v. City of Riesel, Tex.* (C. C. A. 5th, 5), 146 F. 2d 130, followed in 146 F. 2d 131, certiorari ied 65 S. Ct. 1195, 325 U. S. 860, 89 L. Ed. 1981, ch affirmed dismissal of a complaint and from which quote:

"The complaint as amended does not allege the performance of the conditions precedent to Plaintiff's right to recover; nor does it allege that such performance was wrongfully prevented by the City; nor that the period from September 2, 1935, until July 15, 1938 was not a reasonable time within which to perform the conditions precedent; nor was the performance of the conditions precedent in any wise alleged or excused."

'he following additional federal cases which are directly oint are cited:

Landow v. Wolverine Hotel Company (D. C. Ill., 1940), 33 Fed. Supp. 705;

Keegan v. Rupert (D. C. N. Y., 1941), 2 F. R. D. 8.

ee Encyclopedia of Federal Procedure, 2d Edition, Vol. age 661, Section 1350:

"Where defendant's obligation is predicated on a condition precedent, a complaint failing to allege compliance with the condition precedent is obviously insufficient."

In this connection it has already been pointed out that a claimant must bring himself within the conditions of the policy. This raises a question of interpreting the policy. The 9th Circuit has this to say on the subject in *Home Indemnity Co. of New York v. Standard Acc. Ins. Co.* (C. A. A. 9th, 1948), 167 F. 2d 919, 923-924:

> "4. The Rule of Construction
>
> "The ancient rule that all intendments in an insurance policy are to be construed favorably to the insured has one important limitation; namely, that where the language of any given provision of the policy is clear, that language must be followed. In other words, where there is no ambiguity, there is nothing left to be construed. In such a situation, when a party seeks to read something into the contract of insurance that is not there, a court must perforce say, with Shylock,—'Is it so nominated in the bond? * * * I cannot find it; 'tis not in the bond.'
>
> "This is the teaching of the cases in California and elsewhere. In Carabelli v. Mountain States Life Ins. Co., 8 Cal. App. 2d 115, 117, 118, 46 P. 2d 1004, 1006, hearing denied by the Supreme Court of the State, the court said:
>
> " 'The general rule is that an insured must bring himself within the express terms of the policy before he is entitled to recover thereon, and where these terms are plain and explicit, the courts cannot create a new contract for the parties by a forced construction of such plain and explicit terms. Thus the rule of liberal construction in favor of the insured can only have application when the policy presents some uncertainty or ambiguity. (Cases cited).'

"The same doctrine has been recognized by this court. In Fidelity Union Fire Ins. Co. v. Kelleher, 9 cir., 13 F. 2d 745, 746, Judge Hunt said:

" 'Following the steadily adhered to decisions of the Supreme Court, it is seen that the present case is directly within the well settled rule of the federal courts, that the terms of the policy are the measure of the liability of the insurer, and that, to recover, the insured must prove that he is within those terms. In Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 14 S. Ct. 379, 38 L. Ed. 231, the court said: "It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consists simply in enforcing and carrying out the one actually made." ' "

California Civil Code, Section 1439 has already been quoted above and it is apparent from the *Home Indemnity Co.* case above cited that the cause of action itself depends upon the claimant being able to bring himself within the terms of the bond and that this is a substantive requirement.

E. The Court Probably Relied Upon a Statement From Appellees' Brief Which Has No Legal Support.

Appellees' brief stated that conditions precedent are a matter of affirmative defense citing *Standard Oil Co. v. Houser* (1950), 101 Cal. App. 2d 481, which contains a misleading statement which is pure dictum. After point-

ing out that the case involved an unconditional guarantee, the Court said at page 488:

> "Defendant admitted the execution of the guaranty in the terms pleaded in the complaint. He did not plead any limitation, condition precedent, exoneration, or any similar defense. Such matters are affirmative defenses and are not available unless pleaded. (Code Civ. Proc., Sec. 437; *Blackwood v. McCallum,* 187 Cal. 655, 659 (203 P. 758); *Pacific M. & T. Co. v. Massachusetts B. & I. Co.,* 192 Cal. 278, 285 (219 P. 972); *Hobson v. Metropolitan Casualty Ins. Co.,* 120 Cal. App. 727, 730 (8 P. 2d 150).)"

None of the cases cited by the Court involve express conditions precedent. The statement was not entirely irrelevant because it appeared that the defendant was urging that matters which did not appear on the face of the unconditional guarantee were conditions precedent. It may well be that any such conditions such as collateral agreements constituting conditions precedent would be matters of special defense.

Appellees also cited *Jack Mann Chevrolet Co. v. Associates Inv. Co.* (C. C. A. 6th, 1942), 125 F. 2d 778, which deals with pleading release and abandonment and does not mention conditions precedent; and *State Farm Mutual Auto Ins. Co. v. Koval* (C. C. A. 10th, 1944), 146 F. 2d 118, which did not involve a condition precedent, but rather apparently a simple covenant; and *Phillips v. Baker* (C. C. A. 9th, 1941), 121 F. 2d 752, which contains no reference whatsoever of conditions precedent. Appellees' statement is entirely unsupported.

2. **This Court's Holding Concerning the Two Bonds That "Each Was Intended for a Distinct and Separate Purpose" Should Eliminate the Performance Bond as a Basis of Judgment Against Appellant.**

The Opinion is patently inconsistent when it holds that each bond was given for a "distinct and separate purpose" and then holds that Appellant was liable under the Performance Bond. The only separate purposes were performance and payment respectively.

The distinction and the result thereof is noted and well established by California decisions. In *Lamson Co. Inc. v. Jones* (1933), 134 Cal. App. 89, 24 P. 2d 845, the Court was faced with the contention that notwithstanding the fact that a payment bond had been furnished, plaintiff had a right to recover upon the performance bond. Note that this was after the decision in *Pacific States Co. v. U. S. Fidelity & G. Co.* (1930), 109 Cal. App. 691, 293 Pac. 812, cited by this Court in the case at bar and which involved a single all purpose bond. The California District Court of Appeal held at pages 91-92:

> "Appellant urges that it has a right of action on the faithful performance bond exacted of the contractor under the contract and which was also furnished by respondent. Such bond runs to the city of Glendale only, and there is no provision therein which runs to the benefit of labor and materialmen. It is well settled that where a separate bond has been filed complying with the statute and inuring to the benefit of laborers and materialmen, no recovery can be had by a laborer or materialman upon the faithful performance bond executed in connection with the same contract which does not by its terms inure to his

benefit. (*Maryland Casualty Co. v. Shafer,* 57 Cal. App. 580 (208 Pac. 192); *Summerbell v. Weller,* 110 Cal. App. 406 (294 Pac. 414).)"

The intention to supply a payment feature which is implied in a surety bond in instances where there is only one bond is expressly negated when the parties have provided a separate bond for this express purpose.

The *Lamson* case turns upon a determination of the intentions of the parties and its principle is the same whether the person claiming recovery on the performance bond in such circumstances is a laborer or the obligee. The liability on the bond depends upon the intentions of the respective contracting parties. In the *Pacific States Electric Co.* case the Court construed the contract as evidencing the intention to supply a payment feature in the one bond supplied.

In the face of this Court's determination that each bond "was intended for a distinct and separate purpose," the *Pacific States Electric Co.* case is not authority for judgment upon the performance bond. We respectfully submit as to this question that if the Court entertains any further doubt as to the matter of intention in this case, an opportunity for further argument should be afforded.

The final determination of this inconsistency is far reaching because once the performance bond is eliminated as a basis for liability, there are points on appeal which have not been decided relative to both the jurisdiction of the Court and procedural and substantive law when the payment bond is relied upon as a basis for the judgment.

3. The Decision Construes Rules 13 and 14 in Such a Way as to Give Judgment Against Appellant on a Non-Existent Cause of Action.

We have heretofore pointed out with reference to the Performance Bond and with citation of decision of the 9th Circuit that if express conditions precedent to recovery are not shown to be performed or excused, there is no cause of action. The point here made rests upon an independent basis.

We quote from pages 6 and 7 of the Opinion of the Court:

> "Appellant asserts that the Glens Falls payment bond was a contract of indemnity against loss only and did not also provide indemnity against liability. Based on that assertion it is contended that no recovery on the payment bond could be awarded until after actual payment by Radkovich Co. or its sureties of a loss for which indemnity was provided by the bond. As shown above, a pleading of payment was not required because of the provisions in Rules 13 and 14. Appellees contend that the same rule provisions allow acceleration of accrual of claim to prevent circuity of action even if the payment bond provides indemnity against loss only, citing to such effect: (Citations omitted). Determination of this contention is not necessary under the circumstances of this case since in a closely similar situation in *Alberts v. American Casualty Co.*, 88 Cal. App. 2d 891 (1948) the contract was held to indemnify against liability. We apply the same interpretation of California law to the Glens Falls payment bond in the present case."

Rules 13 and 14 recognize that liability of one party ma be a contingency to the liability of another and that cir cuity of action will be avoided if all parties are abl to be brought into one action. But in such a case th facts and circumstances which have given rise to th claim against the first defendant have already happened All that remains to be determined is the result. The re sult as to the original defendant may be contingent upo proof and the liability of the second or cross-defendan or third party defendant may be contingent upon the lia bility of the original defendant.

We believe that the Court has overlooked the distinc tion between the situation contemplated by the rules a above described and the circumstances of this case. An cause of action to be cognizable must have accrued, o to put it another way, it must be one based upon a righ established by the substantive law (in this case the law of California). The Federal rules do not create sub stantive rights or rights to recovery. In fact they ar limited by law as follows:

> "Such rules shall not abridge, enlarge or modify any substantive right . . ." (28 U. S. C. A. 2072.)

The substantive right to recover under the Paymen Bond is expressly limited by statute of the State of Cali fornia and in applying the rules the Court is not author ized to *"abridge, enlarge or modify"* the right of recover therein recognized.

California Civil Code, Section 2778 provides:

> "Upon an indemnity against claims, or demands or damages, or costs, expressly, or in other equiva lent terms, the person indemnified *is not entitled t recover without payment thereof.* . . ." (Empha sis added.)

The *Alberts* case cited in the quoted portion of the Opinion has been misconstrued as enunciating a rule of law while actually it is a case wherein an ambiguous bond was construed according to the intentions of the parties. The Court held that the parties intended the bond as protection against liability and not merely loss or damage.

The true interpretation of the pertinent issue is to be found in *Ramey v. Hopkins* (1934), 138 Cal. App. 685, 688, 33 P. 2d 433, from which we quote:

> ". . . A liability is not a damage, according to the signification of that term as employed in contracts of indemnity, and it has been said that courts have no authority to insert the term 'liability' in a contract, and then proceed to enforce the contract as they—but not the parties—have made it. . . . the right of action upon a bond indemnifying against loss or damage accrues only, and at the time when the indemnitee suffers actual loss by being compelled to pay, and the actual payment of damages. . . . Nor is it necessary to cite further authorities that before an action can be begun upon a contract of indemnity insuring against loss or damages the damages must have been paid as required by subdivision 2 of section 2778 of the Civil Code."

Clearly interposed between liability of Woolley and liability of Glens Falls is the Payment Bond. The liability of Glens Falls is entirely dependent upon the terms thereof. So that even if Woolley is liable, a new and further additional event must take place before Glens Falls is liable, to wit, actual payment by the obligee Radkovich so that he has suffered the *damage* concerning which the bond was given. This may never come to pass. Particularly is this true in the instant case because Radkovich is broke. [R. 307-308, 479.]

Obviously then, when Rule 14 (and similarly Rule 1 provides that a defendant may bring in as a new par a person "who is or may be liable to him for all or pa of the plaintiff's claim against him," the rule refers to t *"plaintiff's claim against"* such defendant and not to independent contractual duty to reimburse the defenda in certain contingencies which have not yet happened a may never happen. That is to say that the rule perm all parties to be brought in who may be liable on the su stantive right of the plaintiff which has become actiona but it does not sanction adjudication of contingent rig which even a final judgment in favor of the plaintiff do not render actionable, but which will ripen only upon t happening of a further event after judgment.

Any executory contract presents a situation where one or both of the parties may be liable in the sense th some future event may cause liability. But no acti may be maintained for a monetary judgment until t contingency has come to pass and the amount of damag is ascertainable.

We respectfully submit that the Court has sanction a judgment upon a non-existent cause of action throu misconstruction of the rules.

This principle is the crux of Appellant's contenti that ancillary jurisdiction over this cause of action is lac ing because the subject matter of Glens Falls' liabili is its indemnity contract which does not become actiona simply by judgment on the plaintiffs' claim against Ra kovich or Woolley or both.

It is necessary to "abridge, enlarge or modify the su stantive right" of Glens Falls to grant a judgment agai it in the face of the California statute noted pursuant which there is or is not a substantive right of acti

e judgment granted in the Federal Court could not ve resulted in the State Court. We submit that the e of *Erie Railroad v. Tompkins,* 304 U. S. 64, 82 L. . 1188, 58 S. Ct. 817, is directly in point.

Arising upon the same contentions is the case of *Brown Cranston* (C. C. A. 2d, 1942), 132 F. 2d 631, 148 L. R. 1178. The decision was written by Augustus Hand, Circuit Judge. It directly raised the conflict ween Rule 14 and Rule 82. The action was for con- ɔution between joint tort-feasors which as authorized a statute of the State of New York, permitted judgment favor of one joint feasor against another only after lgment against such joint feasors had been rendered l then only after one of them had *paid* more than pro rata share of the judgment.

The decision included the following quotation of an alysis of the situation by Professor Moore in his eatise on the Federal Rules of Civil Procedure:

> "But until the right of contribution is changed, federal courts sitting in New York should follow the New York law as outlined above. As a consequence if X and Y, in *pari delicto,* negligently injure A, and A sues only X, X has no substantive right against Y for the federal court to enforce, and hence the procedure outlined in Federal Rule 14 is not applicable. . . ."

Judge Hand pointed to a difference of opinion between judges of the New York Court of Appeals which l determined that the statute in question declared the ɔstantive law of New York and concluded the opinion follows:

> ". . . While Sears and Crouch, J. J., had regarded Section 211-a as creating a substantive, though

inchoate, right of contribution upon which section 193(2) might operate, their views were discarded by the Court of Appeals because no substantive right was shown to exist upon which Section 193(2) could rest. We think it reasonably clear that the decision in Fox v. Western New York Motor Lines, Inc., 257 N. Y. 305, 178 N. E. 289, 78 A. L. R. 578, set forth the substantive law of New York rather than a mere procedural rule.

"While Rule 14, unlike Section 193(2) of the New York Civil Practice Act, gives the defendant a right to bring in a third person, 'who is or may be liable . . . to the plaintiff,' in view of the decisions of the Supreme Court in Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487, and Klaxon Co. v. Stentor Electric Co., 313 U. S. 487, 496, 85 L. ed. 1477, 61 S. Ct. 1020, we do not feel justified in so construing this rule as to give the defendant a recovery which could not be obtained through any remedy available in the New York State Courts. To do so would attach a greater significance to the choice of the forum than those authorities would seem to sanction. Inasmuch as the original defendant in the case at bar could obtain no contribution in New York, if we held that Rule 14 governed, 'the accident of diversity of citizenship would . . . disturb equal administration of justice in coordinate state and federal courts sitting side by side.' Klaxon v. Stentor Electric Co., 313 U. S. 487, at page 496, 85 L. ed. 1477, 61 S. Ct. 1020, at page 1021. Such a disposition would be contrary to the whole theory of Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487.

"In spite of the great convenience and advantage of applying Rule 14 in the present case we feel im-

pelled to hold that we are precluded from doing this by the interpretation of the New York statutes by its highest court."

The decision of this Court with which this petition is concerned affirms the judgment of the Trial Court against Glens Falls based upon the Payment Bond. The Ninth Circuit is therefore directly opposed in viewpoint to the Second Circuit. We respectfully urge reconsideration of the Opinion to the end that the Ninth Circuit should agree with the Second Circuit or should make its difference of opinion apparent on the face of the Opinion.

4. The Court Has Indicated That a Proper Record Is Not Before the Appellate Court.

From the citation of *U. S. v. Foster* (9th Cir., 1941), 123 F. 2d 32 and *Anderson v. Federal Cartridge Corp.* (8th Cir., 1946), 156 F. 2d 681, it would appear that the Court considered that the record is so incomplete that the issues raised by Appellant can't be considered. It raises the thought that the Court would review the evidence if it could.

We hasten to urge the Court to examine the record presented should this have in any way hampered review of the case. All of the testimony of all of the witnesses is in the record as are also all of the pleadings, the Trial Court's Memorandum of Conclusions, numerous letters between the trial judge or his law clerk and counsel, proposed findings which the Court put aside to draw its own, judgment and notice of appeal. Exhibits were submitted in their original form as provided for by rules of court.

We respectfully submit that the entire record is before the Court and counsel for Appellant plead, "Not Guilty" to their indictment, which their clients can hardly under-

stand after paying $1,485.00 to the Clerk to have the record printed.

We have again pointed with particularity to the specific parts of the record upon which we have relied to establish a premature payment to Woolley and the conflict between the findings and the only evidence at one point and conflict of certain findings with others. In the event that a portion of the transcript has not heretofore come to the attention of the Court through some mischance, we trust that the questions raised in Appellant's briefs and the law applicable thereto in the briefs will be re-examined.

Conclusion.

For the reasons herein stated it is respectfully submitted that a rehearing should be granted in this cause.

JOHN E. MCCALL,

J. HAROLD DECKER,

ALBERT LEE STEPHENS, JR.,

By ALBERT LEE STEPHENS, JR.,

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